No. 153.
Reply Brief of Plaintiff in Error.
Filed Feb. 17, 1900.

IN THE

Supreme Court of the United States

WILLIS THORP,
Plaintiff in Error,

vs.

S. A. BONNIFIELD and JOHN HEID,
Defendants in Error.

No. 153.

REPLY BRIEF OF PLAINTIFF IN ERROR TO DEFENDANTS IN ERROR'S ADDITIONAL GROUND FOR DISMISSAL AND ALSO UPON MERITS.

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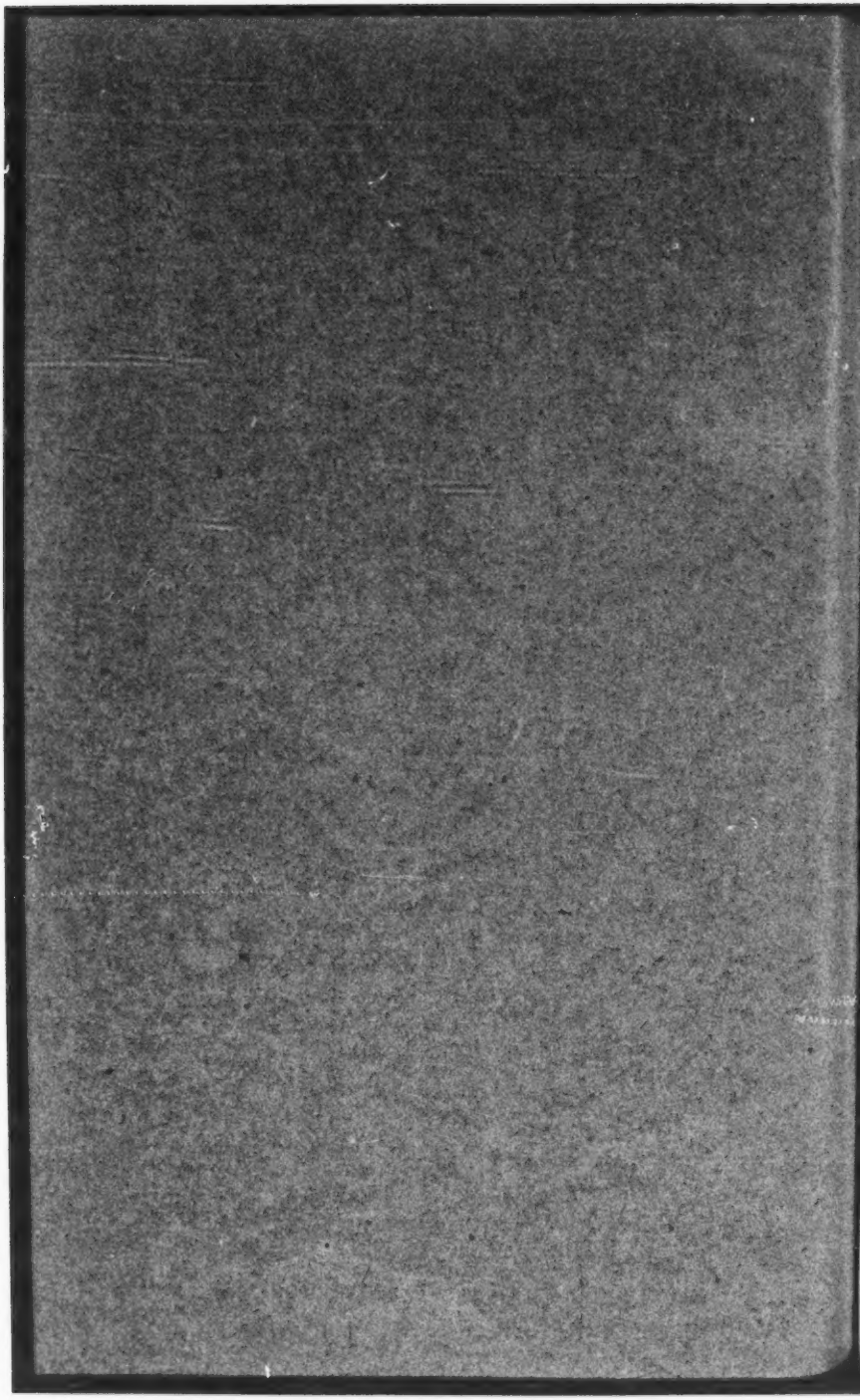

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Reply Brief of Plaintiff in Error to Defendants in Error's Additional Ground for Dismissal and also upon Merits.

Learned counsel for defendants in error preface their answering brief upon the merits by a statement urging an "Additional Ground for Dismissal of Appeal."

This additional ground for dismissal urged now, but which was not specified nor urged as a ground in their motion, or their brief thereon, and which we think comes too late, is that the amount in controversy is less than the jurisdictional amount.

The judgment rendered and entered is for $7,231.25. It is true the record shows that Bonnifield, claiming to be the owner of seven-ninths of this judgment, attempted to enter a *pro rata* satisfaction. But this could not be done by the client under the circumstances of this case. He also, in the absence of his counsel, signed a stipulation extending time for Thorp to answer, but this stipulation is claimed by defendants in error to be a nullity. We think his attempted satisfaction is likewise a nullity.

Upon a writ of error brought by defendants, the amount in controversy is fixed by the sum or amount recorded in the judgment, and a remittitur or subsequent change in the amount will not serve to defeat the appeal; otherwise the successful litigant, no matter how erroneous the judgment might be, would have it in his power by entering a remittitur or partial satisfaction, to deprive the losing party absolutely of his right to appeal. In other words a remedy given a judgment debtor by law can be abolished by act of the opposing party.

Thompson vs. Butler, 95 U. S., 694;

N. Y. Elev. R. R. Co. vs. 5th Nat'l Bank, 118 U. S., 608.

Hilton vs. Dickinson, 108 U. S., 165;

The Propeller Burlington, 137 U. S., 386;

Keller vs. Ashford, 133 U. S., 610;

Dist. of Col. vs. Gannon, 130 U. S., 227;

Knapp vs. Banks, 2 How., 73;

Walker vs. U. S., 4 Wall., 163;

Gordon vs. Ogden, 3 Pet., 33.

We would further suggest that the complaint demands judgment for the entire sum, and judgment is rendered for the entire amount; that both the defendants in error are in this court contesting this case.

REPLY BRIEF ON THE MERITS.

I.

INSUFFICIENCY OF COMPLAINT.

Counsel for defendants in error admit, as contended by us, that before Thorp should become liable to defendants in error in any amount, there must be profits left after payment of three items:

(1st). Expense of operation.

(2nd). Duncan-Corbus Mortgage.

(3rd). "All and every other claim standing against or on account of the property."

They also admit that the complaint fails to allege

or credit Thorp with any outlay on account of either the second or third items above; but claims that the allegation that "Thorp extracted gold and ore of the value of $35,500 at a cost of $23,000, leaving a balance of profits of $12,500," is sufficient, and that our demurrer admits the existence of the surplus. A demurrer admits only what is properly pleaded.

They claim that these other items are matters of defense to be pleaded by us. We do not think so. Their contract binds Thorp to pay these three items and divide the balance. They must show the balance after paying said items.

We wish here to emphasize what we said anticipatory on page 12 of our former brief, viz:

There is a distinction between contingencies which must be pleaded by defendant and those which must be set forth in the complaint. If Thorp's obligation depended on an act to be done by the plaintiff, then such would be a defense to be pleaded by him; but if it depends on a contingency, as in this case, other than an act to be done by plaintiff, then the complaint must show the happening of such contingency.

(See authorities cited on page 12 of our former brief upon the merits.)

II.

Error in granting motion for default without notice to Thorp's counsel.

Defendants in error claim that Section 530 of the Oregon Code set out in our brief, does not require such notice. We cite further Section 526 of the Oregon Code, which reads as follows:

"Notices shall be in writing, and notices and other papers shall be served on the party or attorney in the manner prescribed in this title where not otherwise provided in this code."

We submit that the above sections require notices of all motions or applications to be served on the opposite party after appearance. And see

Tolmie vs. Otchin, 1 Or., 95.

III.

Error of the court in refusing to set aside the default or to relieve defendants.

The substance of the answer by the counsel to our argument on this alleged error is that unless there is an abuse of sound legal discretion the doing of the court below will not be disurbed, and they cite numerous authorities on the proposition. We do not contest this as a general proposition, but we claim that the claim of the plaintiffs below, but shows further that the facts in this case show that there was a grave abuse

of discretion by the court below. That a grave wrong was done to Thorp. The affidavit of merits which sets forth Thorp's answer shows not only a perfect defense to the claim of the plaintiff below, but shows further that they are indebted to Thorp in a large sum of money. Inasmuch as the complaint, even assuming it to be good, is very indefinite and silent on certain matters, and that they are all explained or made plain by Thorp's answer, and in view of the fact that the court was created for the purpose of doing justice between man and man, and for the purpose of righting wrong, we think that when the court below refused to allow Thorp to file his answer on terms and entered judgment against him for over $7,000, it was a grave abuse of discretion.

The cases cited by counsel, namely, *Lovejoy vs. Willamette Lock Company*, and *Askren vs. Squire*, are not applicable. In the former case judgment was entered after a trial and the receiving of evidence, and the inspection of premises by the court, and the judgment was against the plaintiff who sought to be relieved under the section in question, and the court held rightly, and the refusal of the court to grant the relief asked was, we think, under the facts and circumstances of that court not an abuse of discretion.

In the case of *Askren vs. Squire* the court held the affidavit submitted in support of the motion did not show

such excusable neglect as would warrant the Supreme Court to say that the refusal of the lower court was an abuse of discretion. There is nothing to show what the facts relied on were. In this respect it is very different from the case at bar.

See Branson vs. the O. R. Co., 10 Ore., 278.

IV. V.

Error in granting and entering judgment on default without proof and without notice. Counsel avoid this error by two propositions:

First. That the judgment is presumed to be regular.

Second. That proof was unnecessary.

We do not find fault with the proposition of counsel as to the presumption of the regularity of judgments of a court of record, and to what is presumed in cases where the record is silent, but in the case at bar the record is not silent on the question of whether proof or calculation was offered or not. On the contrary the record shows, page 36, that the court ordered judgment to be entered in accordance with its opinion denying the motion to open default, and that judgment was entered accordingly, so that on the face of the record it appears that no proof was offered, so that the decision cited by counsel on this proposition, namely: *Crane vs. Brannan, Dimick*

vs. Campbell, Jarvis vs. Blanchard are not applicable to the case at bar.

To summarize, we claim that the complaint does not state facts sufficient to constitute a cause of action, and that the District Court erred in granting a default, and in his refusal to set the same aside, and in his entering judgment without proof, for which reason plaintiff in error prays, as in his former brief, that the case be reversed.

Respectfully submitted,

J. T. RONALD,

Attorney for Plaintiff in Error.